TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~462.~~ 239 49

WILLIAM B. WEBB, TRUSTEE, PLAINTIFF IN ERROR,

vs.

ALEXANDER SHARP.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 8, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 462.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between William B. Webb, trustee, plaintiff, and Alexander Sharp, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this 8th day of June, in the year of our Lord 1870, and of the independence of the United States the 94th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To ALEXANDER SHARP:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein William B. Webb, trustee, is plaintiff and you are defendant, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Abraham B. Olin, justice of the said supreme court of the District of Columbia.

A. B. OLIN, *Justice.*

Service acknowledged.

W'M F. MATTINGLY,
Att'y for D'f't.

JULY 5, '70.

(Indorsed:) Filed 8th June, 1870.

2 *The answer of the chief justice and justices of the supreme court of the District of Columbia, within named.*

As to the said chief justice and justices as within commanded, I, Return J. Meigs, clerk of said court, do hereby, under my hand and the seal of said court, in the schedule to this writ annexed, transmit to the Supreme Court of the United States a true copy of the record and of all the proceedings of said supreme court of the District of Columbia, in the cause within mentioned, to wit:

3 *Declaration.—Filed July 16th, 1869.*

In the supreme court of the District of Columbia, the 16th day of July, A. D. 1869.

WILLIAM B. WEBB, TRUSTEE, PL'FF,
vs.
ALEXANDER SHARP, DEF'T. } 5954. At law.

The plaintiff sues the defendant for wrongfully taking and detaining his, said plaintiff's, goods and chattels, to wit, one double-cylinder Hoe printing press, of the value of four thousand dollars.

And the plaintiff claims that the same be taken from the defendant and delivered to him; or if they are eloigned, that he may have judgment of their said value, and all mesne profits and damages, which he estimates at , besides costs.

By HENKLE & INGERSOLL,
Att'ys for Pl'ff.

4 The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

HENKLE & INGERSOLL,
Att'y for Pl'ff.

Affidavit of W. B. Webb, plaintiff.—Filed July 16, 1869.

In the supreme court of the District of Columbia, the 16th day of July, A. D. 1869.

WILLIAM B. WEBB, TRUSTEE, PL'T'FF,
vs.
ALEXANDER SHARP, DEF'T. } 5954. At law.

The plaintiff makes oath that, according to his information and belief, he is entitled to recover possession of the chattle proposed to be replevined in this action, being the same described in the declaration, to wit, one double-cylinder Hoe printing press; that the defend-
5 ant has seized and detains the same, and that the said chattles were not subject to said seizure, and were not taken by the defendant upon any writ of replevin.

W. B. WEBB, *Trustee.*

Subscribed & sworn to before me this 16th day of July, 1869.
R. J. MEIGS, *Clk.*

Plaintiff's undertaking.—Filed 16th July, 1869.

In the supreme court of the District of Columbia, the 16th day of July, A. D. 1869.

WM B. WEBB, TRUSTEE, PL'FF,
vs.
ALEXANDER SHARP, DEF'T. } 5954. At law.

The plaintiff, and Saul S. Henkle, his surety, appear, and submitting to the jurisdiction of the court, hereby undertake for themselves, and

each of them, their and each of their heirs, executors, and ad-
6 ministrators, to abide by and perform the judgment of the court in the premises, which judgment may be rendered against all of us.

W. B. WEBB. [SEAL.]
S. S. HENKLE. [SEAL.]

Approved July 16th, 1869.

R. J. MEIGS, *Clerk.*

Summons to appear.—Issued 16th July, 1869.

In the supreme court of the District of Columbia, the 16th day of July, 1869.

WILLIAM B. WEBB, TRUSTEE, PLAINTIFF,
vs.
ALEXANDER SHARP, DEFENDANT. } At law. No. 5954.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first
7 day of the special term occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

HENKLE & INGERSOLL.

NOTE.—The special terms of the court commence on the first Tuesday of every month except May, in which month they commence on the third Monday, and August, in which month there is no term.

Replevin.—Issued July 16th, 1869.

In the supreme court of the District of Columbia, the 16th day of July, 1869.

WILLIAM B. WEBB, TRUSTEE, PLAINTIFF,
vs.
ALEXANDER SHARP, DEFENDANT. } 5954. At law.

The President of the United States to the coroner for said District, greeting:

8 The plaintiff in this action having found sufficient sureties to prosecute the same, you are therefore hereby commanded to take the goods and chattels claimed by the plaintiff, to wit, one double-cylinder Hoe printing press, from the defendant, and deliver the same to the plaintiff. And warn the defendant to appear in said court at the first special term thereof, occurring twenty days after service of this writ, and answer said action, and that if he make default in so doing, the plaintiff may proceed to judgment at the trial term of the court next after service of this writ.

Witness, D. K. Cartter, chief justice of said court.

R. J. MEIGS, *Clerk.*

HENKLE & INGERSOLL.

Receipt of trustee.

Received of W. W. Potter, coroner, the press named in the within writ of replevin.

W. B. WEBB.

JULY 17TH, 1869.

9 *Coroner's return.—Returned July* 17, 1869.

Replevined & delivered as per schedule and receipt, and served copy of summons and declaration on def't.

W. W. POTTER, *Coroner.*

Schedule.

W'M B. WEBB, TRUSTEE, *vs.* ALEX'R SHARP. } 5954. At law.

Schedule: One double-cylinder printing press.

We, the undersigned, citizens of the District of Columbia, having been duly summoned by the coroner of said District, do appraise the printing press named in the above schedule to the sum of three thousand dollars.

Witness our hands and seals this 17th day of July, 1869.

J. C. FRANZONI. [SEAL.]
JOS. L. PEARSON. [SEAL.]
N. WATKINS. [SEAL.]
R. O. POLKINHORN. [SEAL.]

10 *Plea of not guilty.—Filed July* 21, 1869.

In the supreme court of the District of Columbia.

W'M B. WEBB, TRUSTEE, *vs.* ALEX. SHARP. } At law. No. 5954.

The defendant says he is not guilty as alleged.

W'M F. MATTINGLY,
Attorney for Def't.

Joinder in issue.—Filed July 24, 1869.

In the supreme court of the District of Columbia, July 23, A. D. 1869.

WILLIAM B. WEBB, TRUSTEE, *vs.* ALEXANDER SHARP. } At law. No. 5954.

The plaintiff joins issue upon the defendant's plea.

HENKLE & INGERSOLL,
Att'ys for Pl'ff.

11 *Notice to clerk.*

In the supreme court of the District of Columbia, the 6th day of Sept., 1869.

W. B. WEBB, PLAINTIFF,
and
ALEX. SHARP, DEFENDANT. } At law. No. 5954.

Henkle & Ingersoll, attorneys for plaintiff; Mattingly, attorney for defendant.

Last pleading filed 6th day of Sept., 1869.

W'M F. MATTINGLY,
Attorney for Def't.

To the CLERK.

Agreed statement of facts.—Filed Jan'y 4, 1870.

In the supreme court of the District of Columbia.

W'M B. WEBB, TRUSTEE,
vs.
ALEX. SHARP. } No. 5954. At law.

Henry Polkinhorn was the owner of the land and buildings
12 thereon in which was placed the printing press, the subject of the replevin in this case, by John F. Coyle and Chauncey H. Snow, (partners doing business under the firm name of Snow, Coyle & Co.,) who had leased said premises from said Polkinhorn.

On the 22d April, 1869, said printing press was attached at the suit of said Polkinhorn entered in this court for $600 00 less than the three months' rent for said premises immediately preceding then due and unpaid by said Snow, Coyle & Co.

On the 29th June, 1869, said printing press was again attached at the suit of said Polkinhorn for the sum of $416 66 additional rent subsequently accruing due for said premises, the said printing press still being in the building leased to said Snow, Coyle & Co.

On the 25th day of June, 1869, final judgment was had in the first of said attachment suits for said sum of $600, and judgment of condemnation of said press was entered.

On the 9th day of July, 1869, a writ of fieri facias was issued
13 on said judgment and levied on said press by the United States marshal for this district.

On the 11th day of December, 1867, the said Snow and Coyle, by their certain indenture of that date, conveyed said printing press, with other personal property, to W'm B. Webb, in trust to secure unto the First National Bank of Washington the sum of five thousand dollars for money loaned them by said bank; said sum of five thousand dollars being payable in weekly instalments of five hundred dollars each after said date with interest, and upon the further trust, viz., to permit said Snow and Coyle to remain in possession of said press and other property, and enjoy the use thereof "until default shall be made in the payment of the aforesaid sum of five thousand dollars, or of any one of the aforesaid weekly instalments thereof;" and upon such default giving power to said trustee to take possession of said personal property and sell the same at public auction, and out of the proceeds, after paying the

14 expenses of sale, to pay said indebtedness. Said deed was duly stamped, acknowledged, and recorded, and is to be taken as a part hereof, (here insert.)

The said printing press was purchased by said Snow & Coyle, and placed in said premises after the same had been leased by them from said Polkinhorn, and before the execution of said deed of trust, and there remained until the 17th day of July, 1869, when it was replevined by the plaintiff in this case, as trustee under said deed out of the custody of the said marshal, the defendant in this case, no part of said debt having been paid.

It is further agreed that this case shall be decided by the court on the foregoing statement of facts, and to that end may be certified by the court to the court in general term, to be there heard in the first instance.

S. S. HENKLE,
Att'y for Pl'ff.
W'M F. MATTINGLY,
Att'y for Def't.

15 *Deed referred to in agreed statement.*

This indenture, made this eleventh day of December, in the year of our Lord one thousand eight hundred and sixty-seven, between Chauncey H. Snow and John F. Coyle of the first part, and William B. Webb of the second part, all of Washington City, in the District of Columbia.

Whereas the said parties of the first part are indebted unto the First National Bank of Washington in the full sum of five thousand dollars, for money loaned and advanced; which said sum they, the said parties of the first part, are to repay to the said bank, in weekly instalments, that is to say, by the payment of the sum of five hundred dollars in each and every week after the date of these presents, with interest, until the whole of the said sum of five thousand dollars, with the accrued interest thereon, is fully paid and satisfied.

And whereas the said parties of the first part are desirous to
16 secure the payment of the said sum of five thousand dollars, with all interest, costs, and charges thereon, and each and every of the said instalments thereof in manner and form as aforesaid, and to that end have entered into and executed these presents:

Now this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises and of the sum of five dollars current money to them, and each of them, in hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby duly acknowledged, have bargained and sold, transferred and set over, and by these presents do bargain and sell, transfer and set over to and unto the said party of the second part, his executors, administrators, and assigns, all and singular the printing presses, steam-engine, machinery, type, and all other materials of whatsoever description, now standing, lying, and being in the building on D street north, near 7th street west, in
17 the said city of Washington, and known as Polkinhorn's Building, and used by the said parties of the first part in printing and publishing the "National Intelligencer" newspaper, and also all other chattels and goods of every kind and description now in said building:

To have and to hold all and singular said steam-engine and machinery, presses, type, and all the material used in the printing of the said newspaper, and the job printing of said establishment, and all other chattels and goods hereby bargained and sold, unto the said party of the second part, his executors, administrators and assigns, unto his and their sole

use and benefit and behoof, forever; in trust, nevertheless, for the interests, uses and purposes following and none other, that is to say: in trust to suffer and permit the said parties of the first part to have, hold, use, occupy, possess, and enjoy the said goods, chattels, machinery, presses, type and so forth, hereinbefore particularly described and hereby
18 bargained and sold, and the issues and profits thereof to receive and apply to their own use until default shall be made in the payment of the aforesaid sum of five thousand dollars, or of any one of the aforesaid weekly instalments thereof; and upon this other and further trust, that is to say, in trust, should the said parties of the first part fail to pay or to cause to be paid the aforesaid sum of five thousand dollars, or any one of the said weekly instalments of five hundred dollars hereinbefore mentioned and all the accrued interest, costs and charges, when and as the same became due and payable as aforesaid, that then and in any and every such case the said party hereto of the second part shall, upon being notified to that effect in writing by the cashier of the said First National Bank of Washington, enter upon and take possession of the said goods, chattels, machinery, presses, types, and so forth, hereinbefore particularly mentioned, and hereby granted and conveyed, and sell the same, or so much thereof as may be necessary, to pay the said
19 debt, all of which shall then become presently due and payable, with all interest, costs, and charges accrued thereon, at public auction, upon the premises, after first giving reasonable notice in some newspaper published in said city of Washington, of the time, place, and terms of such sale, which terms shall be such as to the said trustee shall seem best for all the parties interested therein, and out of the proceeds of said sale the said trustee shall first pay all the expenses attending the same, including thereon a commission of five per centum upon the gross proceeds of said sale, to himself as a compensation for his services in executing said trust; next he shall pay all of the said debt then remaining unpaid and all interest, costs, and charges accrued thereon; and lastly he shall pay any ballance remaining in his hands, after making the payments, as aforesaid, to the said parties of the second part, their heirs, executors, administrators, or assigns.

20 In testimony whereof the said parties of the first part have hereunto set their hands and affixed their seals the day and date first hereinbefore written.

C. H. SNOW. [SEAL.]
JOHN F. COYLE. [SEAL.]

Signed, sealed, and delivered, having been first duly stamped.
JOHN CARROLL BRENT.

[Revenue $5 00 stamp, cancelled.]

DISTRICT OF COLUMBIA
County of Washington, to wit:

I, John Carroll Brent, a notary public in and for the county aforesaid and District of Columbia, do hereby certify that Chauncey H. Snow and John F. Coyle, parties to a certain deed bearing date on the eleventh day of December, 1867, and hereto annexed, personally appeared before me at my county aforesaid, they being personally known to me to be the persons who executed said deed, and acknowledged the same to be their act and deed.

Given under my hand and official seal this 11th day of December, A. D. 1867.

JOHN CARROLL BRENT,
Notary Public.

21 *Order certifying case to general term.—Filed Jan'y* 4, 1870.

In the supreme court of the District of Columbia.

W'M B. WEBB, TRUSTEE,
vs.
ALEX. SHARP. } No. 5954. Law.

Upon the agreed statement of facts this day filed in the above-entitled case and the consent of the respective attorneys for the plaintiff and defendant, it is, this 4th day of January, A. D. 1870, ordered by the court that this case be, and the same hereby is, certified to the court in general term to be heard there in the first instance.

By order of the Court.

Proceedings of the supreme court of the District of Columbia in general term.

MONDAY, *January 3d*, 1870.

By order of the chief justice, the opening of the court is proclaimed by the marshal. Present, the Chief Justice Cartter, and Justices Olin, Fisher, and Wylie.

22 SATURDAY, *March* 26, 1870.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Olin & Wylie.

WILLIAM B. WEBB, TRUSTEE, PL'FF,
vs.
ALEXANDER SHARP, DEF'T. } At law. No. 5954.

And now come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon the court finds the issue joined in favor of the defendant. Whereupon it is considered that the plaintiff take nothing by his suit, and that the defendant have a return of the double-cylinder Hoe printing press sued for, and recover against the plaintiff the costs of his defense, to be taxed by the clerk, and have execution thereof.

23 In the supreme court of the District of Columbia, the 30th day of May, 1870.

WILLIAM B. WEBB, TRUSTEE, PL'FF,
vs.
ALEXANDER SHARP, DEFENDANT. } At law. No. 5954. In error.

Know all men by these presents, that we are bound unto the above-named Alexander Sharp in the sum of two hundred and fifty dollars, to be paid to the said Alexander Sharp, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 30th day of May, 1870.

Whereas the above-named William B. Webb, trustee, plaintiff, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-

named William B. Webb shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM B. WEBB, *Trustee.* [SEAL.]

Sealed and delivered in presence of—
W. S. HUNTINGTON. [SEAL.]

Approved this 8th day of June, 1870.

A. B. OLIN.

Filed June 8th, 1870.

24 *Clerk's certificate.*

DISTRICT OF COLUMBIA, *to wit:*

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that originals, of which the foregoing writings are true and complete copies, are on file and of record in the clerk's office of said court, and that said originals together constitute the record of the proceedings of said court in a certain case therein depending and lately decided, entitled William B. Webb, trustee, pl'ff, vs. Alexander Sharp, def't, 5954, at law.

In testimony whereof I hereto subscribe my name and affix the seal of said court, this 25th day of June, 1870.

[SEAL.] R. J. MEIGS, *Clerk.*

Fee for record, $7 70. Paid by Mr. Henkle.

R. J. M., *Clk.*

(Indorsement on cover:) No. 462. William B. Webb, trustee, plaintiff in error, vs. Alexander Sharp. District of Columbia sup. court.
Filed 8th July, 1870.

REC. 462—2

Supreme Court of the United States.

WM. B. WEBB, Trustee, Appellant,

vs.

ALEXANDER SHARP.

BRIEF OF SAUL S. HENKLE FOR APPELLANT.

Supreme Court of the United States.

WILLIAM B. WEBB, trustee,
Plaintiff in Error,

vs.

ALEXANDER SHARP.

No. 230.

BRIEF OF S. S. HENKLE FOR PLAINTIFF.

STATEMENT OF CASE.

The agreed statement of facts shows, that Henry Polkinhorn was the owner of a house and lot in the city of Washington, which was occupied as tenants by Snow, Coyle & Co., for a printing office; that a part of the material of said office was a double-cylinder Hoe printing press.

That, on the 11th day of December, 1867, Snow & Coyle made a deed of trust, conveying said press, with other material, to William B. Webb, in trust, to secure the First National Bank of Washington the sum of five thousand dollars, for money loaned them by said bank; said money being payable in weekly installments of five hundred dollars, with interest from said date; and to permit the said Snow & Coyle to remain in possession of said press and other property, and enjoy the use thereof, until default should be made in the payment of said sum of five thousand dollars, or any one of the aforesaid weekly installments thereof; and, upon such default, giving power to take possession of said personal property, and sell the same at public auction, and out of the proceeds, after paying the expenses of said sale, to pay said indebedness. Said deed was duly signed, acknowledged, and recorded.

The press was purchased by Snow & Coyle and placed in said building after the same had been leased by them from Polkinhorn, and remained there until the 17th day of July, 1869. No part of said debt was ever paid.

That, on the 22d of April, 1869, the printing press was attached, at the suit of Polkinhorn, in a proceeding in the supreme court of the District of Columbia, for $600—less than three months' rent for said premises, immediately preceding, then due and unpaid.

That, on the 26th of June, 1869, the press was again attached, at the suit of Polkinhorn, for $416 66 additional rent, subsequently accruing due, for said premises, the said press still being in said premises.

That on the 25th day of June, 1869, final judgment was had on the first of said attachments, for said sum of $600, and judgment of condemnation of said press entered.

On the 9th day of July, 1869, a writ of *fi. fa.* was issued on said judgment, and levied on said press by the United States marshal for said District, who is the defendant herein; and on the 17th day of July, 1869, it was replevied from said marshal by the present plaintiff.

On the 4th day of January, 1870, said cause was ordered by the court in special term to be heard by the court in general term in the first instance.

JUDGMENT OF THE COURT BELOW.

And at the said court in general term, on the 26th day of March, 1870, it was considered, that the plaintiff take nothing by his suit, and that the defendant have a return of the double-cylinder Hoe printing press sued for, and recover against the plaintiff the costs, &c. From which said judgment the plaintiff appeals to this court.

ERRORS.

The plaintiff claims that the court below erred in deciding that the lien of the landlord for rent subordinated the lien of his deed of trust, and in adjudging said printing press to the defendant instead of the plaintiff.

LAW OF ATTACHMENT FOR RENT.

The law under which this attachment proceeding was had is the 12th section of the act of Congress approved February 22, 1867, entitled "An act to amend the law of the District of Columbia in relation to judicial proceedings therein."

By this law the common law distress is abolished, and, instead of it, the landlord is given a tacit lien upon such of the tenant's personal chattels, upon the premises, as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said three months.

In lieu, then, of the distress, the landlord has a *tacit* lien.

THE LANDLORD'S LIEN FOR RENT.

What is a "tacit" lien?

I understand it to be a lien implied by law, and not expressed by contract: as the vendor's lien, the lien of the artisan upon the material which he has manufactured into goods for his charges, the lien of the lawyer upon the papers of his client, &c.

This lien is, with the qualifications to which I shall presently refer, binding upon the parties to it, and upon others dealing with the subject of it in fraud of the rights of the lien-holder; and as to all other persons it has no application.

I need not cite authorities to this court in support of this general proposition. And that Congress did not intend to give to this lien any force beyond that suggested, is apparent from the 1st and 3d remedies which the statute provides for enforcing the lien.

REMEDIES FOR ENFORCING LIENS.

By the 1st the landlord is entitled to an attachment, "to be issued upon affidavit that the rent is due and unpaid, or, if not due, that the defendant is about to remove or *sell* some or all of said chattels."

Why this provision to prevent a *sale*, if the lien is not thereby lost, if the goods be sold to an innocent purchaser without notice? Congress would certainly not have given this unusual remedy, of an attachment for a debt not yet due, if the lien of the landlord was not endangered by the sale of the property before the maturity of the debt.

It is true, that the attachment is also given to prevent a *removal* of the property. And it may be said that the injury sought to be avoided by attachment, to prevent removal or sale, is the same in both cases, viz, the difficulty in tracing or identifying the property. But, by reference to the 3d remedial provision, it is clear that the lien cannot be asserted against a purchaser without notice of it.

The landlord is herein given a right of "action against any purchaser of said chattels *with notice of the lien*," &c.

A person who has bought goods subject to the lien may be sued by the landlord, if he had notice of the lien; but if he had no notice he is not liable, and to save the lien of the landlord he is given the absolute right to attach where the debt is due, and to attach where it is not due, if he make affidavit that the tenant is about to "remove or sell any or all the chattels."

It is true that, by the 2d remedial provision, the landlord may have judgment and execution against the tenant, "to be levied of said chattels, or any of them, in whosesoever hands they may be found."

The lien is upon "such of the *tenant's* personal chattels upon the premises as are subject to execution for debt; but the execution may be levied upon the goods in whosesoever hands they may be found."

They must, however, be the goods of the *tenant*, and they must still be subject to the lien, although in the possession of some person other than the tenant, or in the possession of another, who took them with notice of the lien, and in fraud of the landlord's rights; for, as we have seen, if the goods be sold to a purchaser without notice, he takes a good title, and the lien is lost; and the goods, not

being those of the tenant, are not liable to execution upon a judgment against him.

IF PURCHASER MAY TAKE A GOOD TITLE AGAINST LANDLORD'S LIEN, SO MAY OTHER TACIT LIENS SUPERSEDE HIS.

And what is true of a sale of chattels without notice, would be equally true of any other interest created in them by pledge, deed of trust, or mortgage.

Let us see what would be the effect of giving to this *tacit* lien the force of an absolute lien, binding upon all persons, with or without notice of its existence, as was done by the court below.

A. is the tenant of B., and moves into the tenement of C., taking with him his goods, and being in arrears for rent to B. By this act the lien of the new landlord "commences with the tenancy;" but B's lien continues for three months after the rent is due, and that time has not expired.

Now, here is a tacit lien, in favor of the first landlord, for a period of three months after the rent is due; and a tacit lien, in favor of the new landlord, so soon as the second tenancy begins. One or the other of these liens must give way, and which is it?

The second supersedes the first, provided he did not acquire it in fraud of the first, or with knowledge of its existence.

THE LIEN IS UPON CHATTELS ON THE PREMISES.

The act says that the landlord shall have a lien, &c., upon the "personal chattels upon the premises;" so that there is no lien upon chattels of the tenant which have never been on the premises. And I have shown that the lien ceases upon the removal of the goods from the premises, except where such removal would be a fraud upon the landlord; at all events, if any new interest was created in the chattels after or in consequence of such removal in behalf of innocent parties.

No injustice is done the landlord, for Congress has carefully guarded his rights, by giving him an attachment to prevent removal both before and after the maturity of the debt. The law rewards the diligent, and he who sleeps upon must expect to lose his rights.

ILLUSTRATIONS.

But let us still further illustrate the interpretation of this tacit lien, as given by the court below.

John Doe is the tenant of Richard Roe. He has in his dwelling a piano, which is, of course, subject to the landlord's lien; he takes it to a mechanic and has costly repairs put upon it, for which he does not pay.

Now, the mechanic has a tacit lien for the work and material put into the piano, and he received the instrument to repair without knowing who the party was who brought it; and upon the faith of his implied lien for his charges can the landlord come with his tacit lien and take the piano away without paying the charges, and leave the mechanic only wisdom for his lien?

But again, there is not one business man in ten in this city who owns the building in which he exposes his wares to sale; and these wares, whatever their nature—dry goods, groceries, provisions, coffees, everything that we eat or use or wear, or that furnishes our funerals—are as subject to this tacit lien as are household chattels: and if the doctrine of the court below be sound, you cannot buy a suit of clothes, or a barrel of flour, or a basket of wine, without the liability to a visit from the landlord to reclaim the subject of his lien.

The construction I have given to the provisions of this law will harmonize it with the well-settled principles governing all other implied liens, excepting in its remedial provisions; and this I think will be found to have been the purpose of Congress in its enactment, when the riddles in which it is expressed are solved.

The moment the merchant parts with his goods, the tailor his coat, the lawyer the papers of his client, the lien

ceases, and cannot be reasserted, provided there be no fraud on the part of the person obtaining possession; and tacit liens succeed and exclude each other so often as there is a *bona fide* change of possession.

The only exception which occurs to me, is where the consignor of the goods discovers the bankruptcy or insolvency of the consignee while the goods are in *transitu*, before delivery to the consignee, he may reclaim them. But this is exceptional, and he cannot do it then, if the bill of lading has been previously transferred to a *bona fide* purchaser.

DISTRAINT.

It was argued by the learned counsel in the court below, that inasmuch as by this law the right of the landlord to seize "the personal chattels of *his tenant*" was abolished, the right which the landlord had at common law to seize the goods of persons other than the tenant, found on the premises, for rent arrear, remained intact.

But this unjust and absurd right, which the landlord had of seizing the goods of the stranger which happened to be within the gates of tenancy, was based either upon the conclusive presumption that all chattels found upon the premises are the goods of the tenant, or of vicarious responsibility, which is not recognized by the lower law in this age.

This right of distress was a relic of feudalism, and by the neglect or oversight of Congress lingered in this District after advancing civilization, almost everywhere else, had discarded it.

I apprehend that it will hardly be held by this court, that the iniquity of seizing the innocent stranger's goods for a debt to which he was no party, and of which he had no knowledge, shall be left in tact, while the right of taking the debtor's, which might have some semblance of justice, is abolished.

By the common law, as we inherited it from Maryland, the landlord had no *lien* upon the chattels of his tenant,

and he might remove them from the premises the day before the debt was due, and the landlord was remediless, except by the ordinary processes of the law for the collection of debts.

Vide Buckley *v.* Snoupper, 10 Md., 149.

Had Snow & Coyle, the tenants, any interest in this printing press liable to attachment for rent?

The deed of trust to the plaintiff is dated December 11, 1867, was to secure the sum of five thousand dollars, and was payable in weekly installments of five hundred dollars per week; so that the whole debt became due and payable in ten weeks from that date.

All *legal* right in Snow & Coyle in said press passed from them at the making of said deed, save the right to use and possess it, until default in payment of one or all of the installments of the debt secured by it. And upon the maturity and default in payment of the whole debt, the *equity of redemption* departed also.

The lien is upon "such of the tenants' personal chattels, upon the premises, *as are subject to execution for debt.*"

Was this press "*subject to execution for the debt*" of Snow & Coyle on the 22d of April, 1869, or on the 29th of June, 1869, when it was attached at the suit of Polkinhorn, the landlord?

The rents for which the press was attached *accrued* in 1869; the deed of trust became absolute in January, 1868, more than a year before any part of this rent was due.

At common law an equitable interest could not be taken in execution.

Vide Lenox *v.* Notrebe, Hemp., 251.
King *v.* Tuscumbia, &c., 7 Penn. L. I., 166.
Piatt *v.* Oliver, 2 McL., 268.
Hill *v.* Smith, *Ibid.*, 446.

In some of the States, however, the statutes have provided, that an execution may be levied upon an equitable interest, and a lien thereby created in favor of a judgment

creditor, and the mode of proceeding subsequently is regulated by the statutes themselves.

And in New York the courts have held, that chattel mortgaged, but remaining in the possession of the mortgagor, may be levied on before forfeiture and sold. But, after condition broken, the mortgagor has no interest in the mortgaged premises subject to execution, for the title has become absolute in the mortgagee, and may be levied on and sold as the property of the mortgagee, although in the possession of mortgagor.

Vide Crocker on Sheriffs, 3d edition, pp. 214, 215, sec. 462, and the numerous New York cases there cited.

But in Otis *v.* Wood (in 3 Wend., 500) the whole doctrine of the New York courts is tersely expressed. The principle, say the court, "is, that a person in possession of a chattel, having a right to such possession for a specific time, has an interest which may be sold; and when that interest expires, the owner is entitled to his goods, and may bring an action for them;" and, according to the case of Marsh and Lawrence, the plaintiff waived no right by leaving the property in the hands of the lessee, so long as he had a right to the possession which he might enforce at pleasure," and the same general doctrine is held in all the New York cases.

So that, even under the New York doctrine, (which is a departure from the common law,) there is no interest subject to *execution* remaining in the mortgagor after condition broken, although the goods remain in his possession.

The common-law doctrine prevails in this District, as we inherited it from Maryland.

There are some decisions in Maryland and in Smith *v.* McCain, (in 24 H., 398,) that an equitable estate may be sold on execution; but these decisions are all under an act of the legislature of 1810, and did not affect the law of this District.

Vide Van Ness *v.* Hyatt, 13 Pet., 294.
Smith *v.* McCain, 24 H., 398.

The theory of the court below was, that the lien of the landlord reached back through any period of time to the commencement of the tenancy, and subordinated all intervening interests.

True, the statute says the lien shall "commence with the tenancy;" but it also says it shall "*continue for three months*, and until the termination of any action for such rent brought within said three months."

So that, beginning with the tenancy, it expires in three months; and, if occupancy continues, it revives again and runs for three months and then expires, and so on to the end of the term.

A proper construction of this statute, which I am confident this court will give it, will render it easy and practicable in its execution, and wise and useful in its operation; but, with the interpretation of the court below, we had far better return to the obsolete distress, which was usually in fact what it is denominated in law.

SAUL S. HENKLE,
Attorney for Appellant.

Supreme Court of the United States.

DECEMBER TERM, 1870.

WILLIAM B. WEBB, TRUSTEE,
Plaintiff in Error,
vs.
ALEXANDER SHARP.
No. 230.

Defendant's Brief.

The plaintiff in order to sustain the action of replevin must have been entitled to the possession of the property when he sued out the writ. By the express terms of the deed of trust, made a part of the agreed statement of facts, he was duly authorised to take possession of the property "upon being notified to that effect in "writing by the cashier of the said First National Bank of Wash- "ington." There is nothing in the agreed statement to show that he had received any such notice; and the receipt of the written notice was a condition precedent to his right to the possession.

II.

The property in this case was in custodia legis, and not subject to be taken on a writ of replevin. When sold on execution they may be replevined from the purchaser, and an action for damages maintained against the officers.

Cromwell vs. Owings, 7 H. & J., 55.
Powell vs. Bradlee, 9 G. & J., 220.

III.

The question in this case on its merits is, are the goods of a tenant upon the demised premises, exempt from an attachment for rent due, by reason of an existing deed of trust?

The act of Congress of February 22, 1867, Stat. at Large, p. 404, sec. 12, is as follows:

"The power claimed and exercised as of common right, by every landlord, of seizing by his own authority the personal chattels of his tenant for rent arrear, is hereby abolished and instead of it, the landlord shall have a tacit lien upon such of the tenant's personal chattels, upon the premises, as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said three months. And this lien may be enforced—

"First. By attachment, to be issued upon affidavit that the rent

is due and unpaid; or if not due, that the defendant is about to remove or sell all or some of said chattels; or,

" Second. By Judgment against the tenant, and execution, to be levied on said chattels or any of them, in whosoever hands they may be found; or,

"Third. By action against any purchaser of any of said chattels, with notice of the lien, in which action the plaintiff may have judgment for the value of the chattels purchased by the defendant, but not exceeding the rent in arrears and damages."

It is objected, first, that the property in this case was not subject to execution for debt, and did not therefore come within the provisions of the law; and second, that it was not the property of the tenants, but of the mortgagee. To this we say that the words of the act " as are subject to execution for debt " simply had reference to the exemption law, passed on the 5th of the same month, (14 Stat. 389,) and only designed exempting from the landlord's remedy the amount of property exempted by that law, otherwise the act of the 22d of February might have been construed a repeal pro tanto of the act of February 5th. The property in this case, it is admitted, was subject to the landlord's lien before the execution of the deed of trust. The law gives a lien in express terms commencing with the tenancy. It is a mortgage for the security of the rents imposed by law, and all parties dealing with the property do so, knowing the provisions of the law.

The whole tenor of the act shows that it was intended to give the landlord an available security for his rent. If the property is about to be removed or sold, he can attach for rent not due. On judgment against the tenant, execution can be levied on the property in whosoever hands it may be. And he can even obtain a personal judgment against a purchaser with notice.

A mortgage is not regarded such a bona fide sale as will exempt from distress: in this connection the mortgagee will not be considered a purchaser.

Taylor's Land. & Ten., Sec. 592.

5 Cow. 323, Reynolds *vs.* Shuler.

The code of Iowa, (sec. 1270 and 1271) is in all essential respects similar to our law; and it has been there held that the object of the law is to secure the landlord his rent as it may fall due, and not merely for a debt now due. 9th Iowa, 156 Grant vs. Whitewell.

This case also decides that when goods are sold in the usual course of trade they are sold discharged of the lien.

We respectfully submit that it was not the intention of the law makers that a tenant, by the mere execution of a mortgage on his chattels, should thereby be enabled to deprive his landlord of all security for his rent.

In this case the property remained upon the demised premises for seventeen months after the entire debt secured by the deed of trust had become due.

WM. F. MATTINGLY,
Att'y. for Def't.